85

(2)

No. 07-506

FILED
FEB 13 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

JAMES R. GIBSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals impermissibly vacated petitioner's guilty plea *sua sponte*.

2. Whether petitioner was entitled to the benefits of a plea agreement that the court of appeals invalidated at the request of petitioner.

3. Whether, following vacation of petitioner's guilty plea by the court of appeals, petitioner could, consistent with the Double Jeopardy Clause, be tried on the count to which he pleaded guilty and on the counts that were dismissed pursuant to the plea agreement.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 6
Conclusion 12

TABLE OF AUTHORITIES

Cases:

Bailey v. *United States*, 516 U.S. 137 (1995) 10
Bendix Autolite Corp. v. *Midwesco Enters., Inc.*, 486 U.S. 888 (1988) 11
Dawson v. *United States*, 77 F.3d 180 (7th Cir. 1996) .. 11
Ellis, In re, 356 F.3d 1198 (9th Cir. 2004) 7
Hawk v. *Berkemer*, 610 F.2d 445 (6th Cir. 1979) 12
Klobuchir v. *Pennsylvania*, 639 F.2d 966 (3d Cir.), cert. denied, 454 U.S. 1031 (1981) 12
Lockhart v. *Nelson*, 488 U.S. 33 (1988) 12
Ohio v. *Johnson*, 467 U.S. 493 (1984) 12
United States v. *Barker*, 681 F.2d 589 (9th Cir. 1982)) ... 12
United States v. *Barnes*, 83 F.3d 934 (7th Cir.), cert. denied, 519 U.S. 857 (1996) 8
United States v. *Barron*, 172 F.3d 1153 (9th Cir. 1999) .. 10
United States v. *Bernard*, 373 F.3d 339 (3d Cir. 2004) ... 8
United States v. *Greatwalker*, 285 F.3d 727 (8th Cir. 2002) 8
United States v. *Green*, 139 F.3d 1002 (4th Cir. 1998) .. 12
United States v. *Lopez*, 385 F.3d 245 (2d Cir. 2004) 7
United States v. *Moulder*, 141 F.3d 568 (5th Cir. 1998) . 12

Cases—Continued: Page

United States v. *Mukai*, 26 F.3d 953 (9th Cir. 1994) 8
United States v. *Patterson*, 381 F.3d 859 (9th Cir. 2004) 7
United States v. *Peterson*, 268 F.3d 533 (7th Cir. 2001) ... 8
United States v. *Tateo*, 377 U.S. 463 (1964) 12
United States v. *Thurston*, 362 F.3d 1319 (11th Cir. 2004) 12
United States v. *Transfiguracion*, 442 F.3d 1222 (9th Cir. 2006) 9
United States v. *Zweber*, 913 F.2d 705 (9th Cir. 1990) ... 11

Constitution and statutes:

U.S. Const. Amend. V (Double Jeopardy Clause) 5, 6, 11, 12
18 U.S.C. 371 ..... 2, 4, 6, 8, 11
18 U.S.C. 924(c)(1) 10
18 U.S.C. 1341 (Supp. V 2005) 2
18 U.S.C. 1343 (Supp. V 2005) 2
18 U.S.C. 1956(h) 2

Miscellaneous:

Fed. R. Crim.:
Rule 11(c)(4) 3, 8
Rule 11(e)(1)(C) 4

In the Supreme Court of the United States

No. 07-506

JAMES R. GIBSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 490 F.3d 604. The earlier opinion of the court of appeals (Pet. App. 11-23) is reported at 356 F.3d 761.

JURISDICTION

The judgment of the court of appeals was entered on June 19, 2007. A petition for rehearing was denied on July 17, 2007 (Pet. App. 32). The petition for a writ of certiorari was filed on October 12, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(1).

STATEMENT

After entering a guilty plea in the United States District Court for the Southern District of Illinois, petitioner was convicted of conspiring to commit mail and

wire fraud, in violation of 18 U.S.C. 371. He was sentenced to 262 months of imprisonment. On appeal, the court of appeals vacated his guilty plea, conviction, and sentence, and remanded the case to the district court for further proceedings. Pet. App. 11-23 (*Gibson I*). On remand, the district court reinstated the counts of the indictment that were dismissed pursuant to the plea agreement. Following a jury trial, petitioner was convicted on the mail and wire fraud conspiracy count, in violation of 18 U.S.C. 371; on three counts of mail fraud, in violation of 18 U.S.C. 1341 (Supp. V 2005); on two counts of wire fraud, in violation of 18 U.S.C. 1343 (Supp. V 2005); and on one count of conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h). He was sentenced to 480 months of imprisonment, to be followed by a three-year term of supervised release. He also was ordered to pay restitution in the amount of over $83 million.

1. Petitioner was the owner of SBU, Inc. and several other companies in the St. Louis, Missouri, area. SBU was in the business of arranging tax-advantaged structured settlements in personal injury cases. Petitioner represented to his clients that their structured settlements would be funded with United States Treasury obligations, such as Treasury Bonds; that these obligations would be transferred to a third-party trustee to be held in irrevocable and segregated trusts for each client's sole benefit; and that the clients would receive periodic payments from the interest and proceeds from the redemption of the Treasury obligations. SBU client's sent their personal injury settlement funds directly to petitioner. Pet. App. 2.

After a period of purchasing Treasury obligations with his clients' settlement funds as represented, peti-

tioner ceased making those purchases. Instead, he spent $16.856 million of his clients' money on unauthorized business transactions, high risk investments, and purchases of real estate and luxury items for his own benefit. Petitioner then began redeeming the Treasury obligations he had purchased for his clients and spending the proceeds for himself. Petitioner's clients incurred a total loss of $156,194,810.92 as a result of petitioner's misconduct. Many of the clients needed the money they lost to support themselves and to pay for necessary medical treatment. Pet. App. 3.

When petitioner's attorney informed him that he was under investigation by the government, petitioner and his wife set sail for Belize and wired $3,478,352 of his clients' trust funds to Belize bank accounts. Petitioner returned briefly to the United States but departed for Belize again in 1999. Pet. App. 3.

2. As a result of his misconduct, petitioner was indicted on one count of conspiring to commit mail and wire fraud; three counts of mail fraud; two counts of wire fraud; and one count of money laundering conspiracy. Thereafter, petitioner and the government entered into a plea agreement that provided, among other things, that the parties "agreed, pursuant to [Federal Rule of Criminal Procedure] 11(e)(1)(C), to a sentence of 262 months imprisonment, the maximum fine of $250,000, and restitution in the amount of $66,000,000." Pet. App. 14.[1] The plea agreement also mistakenly stated that the maximum penalty that could be imposed on the mail and wire fraud count was 30 years of impris-

[1] The rule is now embodied in Rule 11(c)(1)(C). It states that a plea agreement may specify that the parties agree to a particular sentence. If the district court accepts the plea agreement of that type, the court is required to impose the agreed sentence. Fed. R. Crim. P. 11(c)(4).

onment. *Id.* at 14, 16, 19. On January 8, 2002, pursuant to the plea agreement, petitioner pleaded guilty to the mail and wire fraud conspiracy count, the government dismissed the remaining counts, and petitioner was sentenced to 262 months of imprisonment. *Id.* at 4.

3. Petitioner appealed. Both parties agreed that petitioner's sentence of 262 months was unlawful because the maximum sentence authorized for conspiracy under 18 U.S.C. 371 is five years of imprisonment. Pet. App. 16. Petitioner contended that the district court erred in accepting a plea agreement that included an unlawful sentence. *Id.* at 19. He also argued that, because he was unaware that he had agreed to an unlawful sentence, he did not knowingly and voluntarily enter a guilty plea. *Ibid.* He asked the court of appeals to "void the entire plea agreement and remand for further proceedings—either a new round of negotiations between the government and [petitioner] or a trial." *Id.* at 17-18; see also *Gibson I* Pet. C.A. Br. 19 ("This Court should hold that the plea and the plea agreement are void and remand this case for further proceedings in the district court.").

Applying the plain-error standard of review, the court of appeals vacated the guilty plea, conviction, and sentence, and remanded the case to the district court for further proceedings. Pet. App. 22-23. In so doing, the court concluded that the district court committed plain error in accepting the plea agreement and in sentencing petitioner above the statutory maximum. *Id.* at 19-22. The court stated that it lacked authority under Rule 11(e)(1)(C) to preserve the guilty plea yet discard the sentence. *Id.* at 17. It explained that, "because the plea agreement * * * contained explicit provisions regarding the exact term of imprisonment, [petitioner] can only

attack the validity of the entire plea agreement. He cannot seek to uphold the plea agreement, yet obtain relief in the form of a different sentence." *Ibid.*

4. On remand, the government moved to reinstate the counts of the indictment that were dismissed pursuant to the plea agreement. The district court granted the motion. Pet. App. 4. Thereafter, a jury found petitioner guilty on all counts. He was sentenced to 480 months of imprisonment, to be followed by three years of supervised release, and he was ordered to pay restitution in the amount of $83,282,767.42. *Id.* at 5.

5. In his opening brief on his second appeal, petitioner contended that three of the charges against him should not have been reinstated because they were barred by the statute of limitations. After filing his opening brief, petitioner filed numerous motions, which the court of appeals denied, to allow substitution of counsel and to delay oral argument to permit supplemental briefing. After oral argument, the court granted the motion for substitution of counsel and supplemental briefing, but declined to hear oral argument on the new issues raised. Those issues were whether, in *Gibson I*, the court had authority to vacate the guilty plea in the absence of a specific request by petitioner that it do so; whether the reinstatement of the dismissed charges violated the Double Jeopardy Clause; and whether the government continued to be bound by the promise it made in the plea agreement to dismiss the charges to which petitioner did not plead guilty.

The court of appeals rejected petitioner's claim that, in *Gibson I*, it should have preserved his guilty plea yet vacated the 242-month sentence thereby limiting him to a five-year sentence. Pet. App. 6. The court observed that, in voiding the entire plea agreement and remand-

ing for further proceedings, it had afforded petitioner the relief that he had requested. *Ibid.* The court also rejected petitioner's statute-of-limitations claim, which petitioner does not renew in this Court. *Id.* at 6-9. The court did not address petitioner's claim that the reinstatement of the dismissed charges violated the Double Jeopardy Clause.

ARGUMENT

Petitioner contends that the court of appeals erred in vacating his guilty plea and in allowing the government to retry him on the count to which he pleaded guilty and on the other counts in the indictment. He argues that, instead, the court should have preserved his guilty plea to the Section 371 conspiracy count; given effect to the plea agreement insofar as it required the government to dismiss the charges to which he did not plead; and vacated his 242-month prison sentence (to which he agreed as consideration for the dismissal of the charges) thereby limiting him to the five-year maximum sentence authorized for a Section 371 conspiracy conviction. Petitioner's claim is without merit and does not warrant the Court's review.

1. Petitioner argues (Pet. 11-15) that the court of appeals lacked authority to vacate his guilty plea without a specific request by him that it do so. But petitioner did make a specific request to set aside his guilty plea. In his opening brief in *Gibson I*, petitioner not only specifically asked the court of appeals to "remand this matter to the district court with directions for the district court to reject the plea agreement." *Gibson I* Pet. C.A. Br. 14-15. Petitioner also specifically asked the court to vacate his guilty plea because it was not knowing and voluntary. *Id.* at 19. In his reply brief,

petitioner reasserted those requests and explicitly acknowledged that, by seeking the above relief, he was "giving up something of value: *the government's dismissal of the remaining counts of the indictment.*" *Gibson I* Pet. C.A. Reply Br. 8 (emphasis added). Not surprisingly, the court of appeals in *Gibson I* expressly understood petitioner to challenge the validity of both his plea agreement and his guilty plea. Pet. App. 19. The court further recognized that petitioner sought a remand for "a new round of [plea] negotiations * * * or a trial." *Id.* at 17-18. In *Gibson II*, the court reiterated that, in *Gibson I*, it had provided petitioner with the relief that he had requested. *Id.* at 6. Petitioner is accordingly mistaken in contending that the court of appeals "*sua sponte* vacate[d] a plea." Pet. 11.

Petitioner argues (Pet. 11) that the decision below conflicts with those courts of appeals that have held that, when a district court rejects a plea agreement, it cannot unilaterally set aside the guilty plea, but must give the defendant the option either of withdrawing the plea or keeping the plea intact. *United States* v. *Lopez*, 385 F.3d 245, 251-252 n.13 (2d Cir. 2004); *United States* v. *Patterson*, 381 F.3d 859, 865 (9th Cir. 2004); *In re Ellis*, 356 F.3d 1198, 1208 (9th Cir. 2004) (en banc). Those cases, however, have no relevance here, because the petitioner specifically asked the court of appeals to set aside his guilty plea.

2. Petitioner also contends (Pet. 22-29) that, following the court of appeals' invalidation of the plea agreement in *Gibson I*, the government remained bound under the agreement by its promise to dismiss the charges. That claim constitutes a reversal of petitioner's position in *Gibson I*, in which he specifically acknowledged that, by seeking invalidation of the plea agreement, he was

"giving up" the dismissals. *Gibson I* Pet. C.A. Reply Br. 8.

Petitioner was not entitled both to vacation of the plea agreement and enforcement of the government's promise under the same agreement to dismiss charges. The government's promise to dismiss the remaining charges was made in consideration of petitioner's undertaking to plead guilty to the Section 371 conspiracy and his commitment to the 262-month sentence. The agreement of the parties concerning the exact term of imprisonment was binding on the sentencing court once it accepted the agreement, see Fed. R. Crim. P. 11(c)(4), and therefore was an "essential term" of the agreement. *United States* v. *Barnes*, 83 F.3d 934, 938 (7th Cir.), cert. denied, 519 U.S. 857 (1996). Petitioner could not simultaneously seek to set aside the plea agreement based on the mutual mistake of the parties that the 262-month sentence could be imposed for a conspiracy while preserving the government's promise to dismiss charges. When a plea agreement is based on a promise of a sentence that turns out to be illegal, the parties must be "return[ed] * * * to their initial positions." *United States* v. *Greatwalker*, 285 F.3d 727, 730 (8th Cir. 2002). As the Seventh Circuit explained in *United States* v. *Peterson*, 268 F.3d 533, 534 (2001), a defendant cannot "have the benefits of [a] plea agreement * * * without the detriments"; rather, "[t]he whole plea agreement stands, or the whole thing falls." Accord *United States* v. *Bernard*, 373 F.3d 339, 345 n.7 (3d Cir. 2004); *United States* v. *Mukai*, 26 F.3d 953, 956 (9th Cir. 1994) ("[A]ccepting Mukai's argument would require the district court to ignore a portion of the [Rule 11(c)(1)(C)] plea agreement while respecting the balance. The court does not have such authority.").

The Ninth Circuit cases on which petitioner relies (Pet. 26-28) do not help him. In *United States* v. *Transfiguracion*, 442 F.3d 1222 (2006), the defendants pleaded guilty to a drug count and provided full cooperation to the government pursuant to a plea agreement under which the government promised to dismiss other charges. Before sentencing, the Ninth Circuit held that the conduct to which the defendants pleaded guilty did not constitute a crime. The defendants then moved to dismiss the indictment and the district court granted the motion. On appeal, the government agreed that the charge to which the defendants pleaded guilty had to be dismissed, but argued that the plea agreement should have been rescinded so that the government could prosecute defendant on a count it had promised to dismiss. The Ninth Circuit rejected this argument, explaining that "with the liberty of [the defendants] at stake and their cooperation having already occurred, we cannot allow the government to rescind their plea agreements on the premise that all the parties mistakenly thought the defendants were pleading guilty to [conduct that constituted a crime]." *Id.* at 1230. The court expressed concern that, if the government were released from its promise to dismiss other counts, it could use the defendants' cooperation to help convict them. *Id.* at 1235.

This case is significantly different from *Transfiguracion*. Most fundamentally, in *Transfiguracion* the government, rather than the defendant, asked the court to set aside the plea agreement. Here, by contrast, petitioner seeks to have it both ways by binding the government to a plea agreement that he himself persuaded the court to invalidate. Moreover, an important factor in the decision in *Transfiguracion* was the impossibility of returning the parties to their initial positions because

the defendants had already provided full cooperation pursuant to the plea agreement. That factor is not present here.

Nor is petitioner helped by his reliance (Pet. 26-28) on *United States* v. *Barron*, 172 F.3d 1153 (9th Cir. 1999) (en banc). In that case, the defendant pleaded guilty pursuant to a plea agreement to three counts, including one count of using a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1). This Court subsequently determined that use of a firearm for purposes of Section 924(c)(1) means "active employment." *Bailey* v. *United States*, 516 U.S. 137, 143 (1995). Barron then collaterally attacked his conviction in light of *Bailey*. The district court held that the defendant could obtain relief only if he withdrew his guilty plea and the parties were returned to the *status quo ante*. Reversing, the court of appeals held that Barron was entitled to relief from his Section 924(c)(1) conviction and to the benefits of the plea agreement. *Barron*, 172 F.3d at 1157-1161. In so doing, the court explained that the defendant had simply moved to vacate a conviction that was void as a matter of law, and that his "motion did not attack the plea agreement in any way," nor "assert that [he] had entered the plea agreement unknowingly and involuntarily." *Id.* at 1158. In those circumstances, the court concluded that the defendant's motion was not a repudiation or breach of the plea agreement. *Ibid.* Here, by contrast, petitioner did repudiate the plea agreement by specifically asking the court in *Gibson I* to set it (and his guilty plea) aside. See *Gibson I* Pet. C.A. Br. 18 (arguing that peti-

tioner's "guilty plea and plea agreement were not entered into knowingly and voluntarily").[2]

3. Petitioner contends (Pet. 16-22) that, consistent with the Double Jeopardy Clause, he could not be tried either on the Section 371 conspiracy count to which he initially pleaded guilty or on the remaining counts that were initially dismissed. He argues that the decision of the court of appeals conflicts with decisions of other courts holding that jeopardy attaches at the time a guilty plea is accepted.

As an initial matter, petitioner raised this claim for the first time on appeal in his supplemental brief in *Gibson II*, and the court of appeals declined to address the claim. In these circumstances, the claim was waived. See *Bendix Autolite Corp.* v. *Midwesco Enters.*, 486 U.S. 888, 895 (1988). Moreover, because the court below did not review petitioner's claim, this case would be a highly inappropriate vehicle for this Court to address an alleged conflict in the circuits.

In any event, petitioner's claims lack merit. Petitioner relies on the general notion that jeopardy attaches with the acceptance of a guilty plea. Pet. 17-18 (citing *Dawson* v. *United States*, 77 F.3d 180, 182 (7th Cir. 1996)). The attachment of jeopardy, however, does not preclude a subsequent trial on the charges to which a

---

[2] Petitioner also relies upon (Pet. 28) the Ninth Circuit's decision in *United States* v. *Zweber*, 913 F.2d 705 (1990). In that case, the court of appeals rejected the defendant's argument that he was entitled to rescind his plea agreement and to withdraw his guilty plea in light of the parties' mutual mistake of law concerning the application of the Sentencing Guidelines. *Id.* at 710-711. Like *Transfiguracion* and *Barron*, *Zweber* did not involve an attempt by a party, such as petitioner, to obtain the benefits of a plea agreement that he had persuaded the court to invalidate.

defendant pleaded guilty when the defendant has succeeded in getting his guilty plea set aside. See, *e.g.*, *United States* v. *Tateo*, 377 U.S. 463, 466-467 (1964); *United States* v. *Thurston*, 362 F.3d 1319, 1322-1323 (11th Cir. 2004); *United States* v. *Moulder*, 141 F.3d 568, 571 (5th Cir. 1998); see also *Lockhart* v. *Nelson*, 488 U.S. 33, 38 (1988) ("the Double Jeopardy Clause's general prohibition against successive prosecutions does not prevent the government from retrying a defendant who succeeds in getting his first conviction set aside, through direct or collateral attack, because of some error in the proceedings leading to conviction)."

Further, jeopardy did not attach to the dismissed counts because, with respect to those counts, petitioner neither pleaded guilty nor was otherwise "exposed to conviction." *Ohio* v. *Johnson*, 467 U.S. 493, 501 (1984). Accordingly, there was no double jeopardy bar to trial on the dismissed counts. See, *e.g.*, *United States* v. *Green*, 139 F.3d 1002, 1004 (4th Cir. 1998); *United States* v. *Barker*, 681 F.2d 589, 591 (9th Cir. 1982); *Klobuchir* v. *Pennsylvania*, 639 F.2d 966, 970 (3d Cir.), cert. denied, 454 U.S. 1031 (1981); *Hawk* v. *Berkemer*, 610 F.2d 445, 447 (6th Cir. 1979).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
ALICE S. FISHER
Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney

FEBRUARY 2008